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HIGHLIGHTS

CAM Rule Said to Cost Industry, States $82 Million Per Year
Industry, states, and other permitting authorities would pay more than $82 million per year to comply with an upcoming Environmental Protection Agency rule that would set new air pollution monitoring requirements, according to EPA estimates. The compliance assurance monitoring rule is expected to be finalized later this year. **Page 2499**

Senate Approves Plan for Radioactive Waste Interim Disposal Facility
The Senate approves controversial legislation that would direct the Department of Energy to build a temporary storage facility for high-level radioactive waste in Nevada while the federal government continues the site-selection process for a permanent nuclear repository. **Page 2506**

Advisory Chairs Fail to Support EPA Proposal on Fine Particulates
Three of four current or former chairmen of the Clean Air Science Advisory Committee tell a congressional hearing that they would not recommend setting a new fine particulate matter standard at the level that has been proposed by EPA. **Page 2500** . . . EPA's proposals to tighten ozone and particulate matter standards will have an enormous impact on small businesses, Ohio Gov. George Voinovich tells another congressional hearing. **Page 2501**

Accord Reached on HWIR Reproposal For Revising Risk Model
Industry groups and EPA reach an agreement on the approach the agency will use in revising the multipathway risk assessment used as the basis for the hazardous waste identification rule, federal officials say. **Page 2509**

Administration of Brownfields Program Questioned at Hearing
EPA may not be the most appropriate federal agency to administer the superfund brownfields program, given that it is partly an economic issue, the chair of the House Appropriations Subcommittee on VA, HUD, and Independent Agencies says. **Page 2511**

Bill Would Ban Some Chlorine Discharges By Pulp/Paper Industry
House legislation (HR 1188) has been introduced that would prohibit the pulp and paper industry from discharging into U.S. waters organochlorine compounds, byproducts, and metabolites formed through the use of chlorine-based bleaching processes within five years. **Page 2514**

Analysis & Perspective

Superfund Settlements: Three recent court decisions rejecting the government's authority to bar contribution claims by defining or construing "matters addressed" to include claims beyond those matters that a consent decree actually addresses are discussed in a BNA Analysis & Perspective article by environmental attorney James D. Brusslan. **Page 2522**

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DRINKING WATER: Draft guidance released by EPA outlines procedures that states should use in conducting source water assessments as part of long-term water protection programs. **Page 2514**

STORAGE TANKS: States would be able to use money from the leaking underground storage tank trust fund to supplement and administer their financial assurance programs under legislation unanimously approved by the House Commerce Committee. **Page 2510**

AIR TOXICS: Wool fiberglass manufacturers would have to control emissions of hazardous air pollutants from furnaces and forming, curing, and cooling processes that are used to produce the substance under a proposed EPA rule. **Page 2504** . . . Text of proposal. **Page 2527**

AIR TOXICS: Pharmaceutical manufacturers would be required to substantially reduce emissions of hazardous air pollutants from their operations under an air toxics rule proposed by EPA. **Page 2505** . . . Text of proposal. **Page 2576**

MOBILE SOURCES: Federal money available for transportation-related air quality improvement projects would double, to $2 billion annually, under legislation (S 586) introduced by Sen. Daniel Patrick Moynihan (D-NY). **Page 2503**

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Analysis&Perspective

SUPERFUND

CONSENT DECREES

In a 1994 decision, the United States Court of Appeals for the Seventh Circuit referred to the government's "sweeping power. . . to extinguish the contribution rights of third parties" in superfund consent decrees. *Akzo Coatings Inc. v. Aigner Corp.*, 30 F.3d 761, 768, 39 ERC 1013. In response, the government and settling parties have entered into consent decrees which explicitly define the term "matters addressed" to attempt to bar all third-party contribution claims, even for voluntary private party cleanups that the decrees do not address. Three recent district court decisions have rejected the government's authority to bar contribution claims by defining or construing "matters addressed" to include claims beyond those matters that the consent decree actually addresses. This article reviews these three district court cases and warns settling parties to define "matters addressed" accurately to avoid judicial disapproval of their consent decrees.

Truth in Superfund Settlements: The Courts Strike Back on 'Matters Addressed' Contribution Protection

BY JAMES D. BRUSSLAN

Besides its primary goals of facilitating the cleanup of the environment at the expense of those responsible for pollution,[1] and encouraging voluntary cleanup,[2] the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA)[3] also encourages settlement.[4] To provide settling parties a measure of finality in return for their willingness to

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[1] "CERCLA . . . seek[s] to protect the public health and the environment by facilitating the cleanup of environmental contamination and imposing costs on the parties responsible for the pollution." *In re Chicago, Milwaukee, St. Paul & Pacific R. Co.*, 3 F.3d 200, 201, 37 ERC 1561 (CA 7, 1993). Accord: *Sidney S. Arst Co. v. Pipefitters Welfare Education Fund*, 25 F.3d 417, 420-21, 38 ERC 1756 (CA 7, 1994). *See also Long Beach Unified School District v. Godwin California Living Trust*, 32 F.3d 1364, 1369, 39 ERC 1065 (CA 9, 1994); *Pennsylvania v. Union Gas Co.*, 491 U.S. 1, 7, 29 ERC 1657 (1989); *U.S. v. Alcan Aluminum Corp.*, 964 F.2d 252, 259-60, 35 ERC 1053 (CA 3, 1992); *Kelley v. E.I. DuPont*, 17 F.3d 836, 843, 38 ERC 1153 (CA 6, 1994).

[2] *Bethlehem Steel Co. v. U.S.*, 918 F.2d 1323, 1326, 32 ERC 1345 (CA 7, 1990)(referring to "the manifest intent of Congress to encourage voluntary cleanup action."); *Nurad Inc. v. William E. Hooper and Sons Co.*, 966 F.2d 837, 845-46, 35 ERC 1005 (CA 4, 1992); *In re Dant & Russell Inc.*, 951 F.2d 246, 248, 34 ERC 1569 (CA 9, 1991); H.Rep. No. 1016, 96th Cong., 2d Sess. 17 [reprinted in 1980 U.S. Code Cong. & Ad. News 6119, 6120].

[3] 42 U.S.C. 9601 *et seq.*

[4] *See U.S. v. Akzo Coatings of America*, 949 F.2d 1409, 1436, 35 ERC 1113 (CA 6, 1991) ("presumption in favor of voluntary settlement"); *In re Cuyahoga Equipment Corp.*, 980 F.2d 110, 35 ERC 1793 (CA 2, 1992); *U.S. v. Cannons Engineering Corp.*, 889 F.2d 79, 92, 31 ERC 1049 (CA 1, 1990); *U.S. v. DiBiase*, 45 F.3d 541, 545-46, 40 ERC 1118 (CA 1, 1995); H.R. Rep. No. 253, pt. 1, 99th Cong., 1st Sess. 80 (1985) [reprinted in 1986 U.S. Code Cong. & Ad. News 2862].

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settle,[5] in the Superfund Amendments and Reauthorization Act of 1986 [6] Congress enacted broad contribution protection provisions. These provisions protect settling parties from contribution claims by any other party for all "matters addressed" in the consent decree:

> A person who has resolved its liability to the United States or a State in an administrative or judicially approved settlement shall not be liable for claims for contribution regarding matters addressed in the settlement.[7]

The extent of contribution protection is based on the "matters addressed" in the consent decree. For instance, assume a site is contaminated with cyanide on its surface and vinyl chloride in the ground water. The government cleans the surface cyanide and files a CERCLA cost recovery action.[8] The government determines that a generator of cyanide, vinyl chloride and lead is 10 percent responsible for contamination at the site. The generator then settles with the government, agreeing to pay 10 percent of the government's cyanide cleanup costs.

Logic would dictate that the consent decree, which relates only to the cyanide cleanup, would define "matters addressed" as the cyanide surface cleanup. In turn, under CERCLA's contribution protection clause, the generator entering the agreement would be protected from all claims by any party relating to the cyanide surface contamination.[9] By contrast, because the consent decree did not address ground water or any part of the site other than surface cyanide, the generator would remain potentially liable for contribution regarding these unaddressed matters. In congressional debate, Sen. Robert T. Stafford (R-Vt) explained that settling parties are protected only as far as the scope of the settlement:

> In cases of partial settlements where, for example, a party has settled with the United States or a State for a surface cleanup, the settling party shall not be subject to any contribution claim for the surface cleanup to any party. The settlor may, however, remain liable in such instances for other cleanup action or costs not addressed by the settlement, such as, in this example, a subsurface cleanup.[10]

Similarly, assume the transporter of hazardous substances to the site has already voluntarily cleaned lead from the surface of the site. Again, the same generator settles with the government, agreeing to pay the government 10 percent of its cyanide cleanup costs. Logic again dictates the generator would be protected from claims relating to the cyanide cleanup, but would remain potentially liable to the transporter for the voluntary lead cleanup.

Unfortunately, as in most superfund matters, confusion rather than logic reigns. Historically, most CERCLA consent decrees did not define the term "matters addressed." Instead, the contribution section of the decree merely stated that the settling party was entitled to protection for the undefined "matters addressed" in the decree. EPA's November 1990 model CERCLA settlement language stated "[w]ith regard to claims for contribution against [Settling Defendants] for matters addressed . . . the Parties hereto agree that the [Settling Defendants] are entitled, as of the effective date . . . to such protection from contribution actions or claims as is provided in CERCLA. . ." [11] It remained a mystery as to which claims were barred as "matters addressed." The determination of what "matters" the consent decree actually "addressed" — and the extent of contribution protection — was often left for courts in future actions against the settling parties.[12]

In 1994, the U.S. Court of Appeals for the Seventh Circuit considered the effect of a consent decree between the United States and private parties (collectively referred to as "Aigner") on a separate CERCLA response cost action filed by Akzo Coatings Inc. against Aigner. *Akzo Coatings Inc. v. Aigner Corp.*[13] Aigner defended on grounds that Akzo's claim was barred as a "matter addressed" by the previous consent decree between the United States and Aigner. That decree did not define "matters addressed," but Aigner had made no payment to Akzo.

After considering the language and context of the decree, the court held that it addressed remedial, but not removal actions. It authorized Akzo to go forward with its removal claim. The court barred Akzo's remedial claim, which was "incurred in . . . attempting to anticipate claims that might be asserted against them by EPA . . . [and] attempting to predict and perhaps shape the provisions of the consent decree [involving remedial costs, which Akzo declined to enter into]." [14] These remedial costs related directly to Akzo's response to the efforts by the government to retrieve its costs.

The court wrote that the parties could have explicitly defined the "matters addressed" in the decree, which would have "been highly relevant to, and perhaps dispositive of, the scope of contribution protection." [15] The

[5] *U.S. v. Cannons Engineering supra*, n.4 at 92; *O'Neil v. Picillo*, 883 F.2d 176, 178-79, 30 ERC 1137 (CA 1, 1989), *cert. denied*, 493 U.S. 1071, 30 ERC 2134 (1990); *United Technologies Corp. v. Browning-Ferris Industries Inc.*, 33 F.3d 96, 39 ERC 1097 (CA 1, 1994), *cert. denied*, 115 S.Ct. 1176, 40 ERC 1224 (1995); H.R. Rep. No. 253, pt. 1, 99th Cong., 1st Sess. 80 (1985) [reprinted in 1986 U.S. Code Cong. & Ad. News 2862].

[6] P.L. 99-499.

[7] CERCLA Section 113(f)(2), 42 U.S.C. 9613(f)(2); Section 122(g)(5), 42 U.S.C. 9622(g)(5); Section 122(h)(4), 42 U.S.C. 9622(h)(4).

[8] CERCLA Section 107(a), 42 U.S.C. 9607(a).

[9] Under Section 113(f)(1), 42 U.S.C. 9613(f)(1), the settling party could pursue contribution claims from nonsettling potentially responsible parties for the costs it paid to the government for the cyanide cleanup.

[10] 131 CONG. REC. S11854-55 (daily ed. Sept. 20, 1985) (statement of Sen. Stafford).

[11] EPA Interim Agency Policy on Contribution Protection Clauses in CERCLA Settlements, 22 ELR 35445 (April 10, 1991); Model CERCLA RD/RA Consent Decree, par. 88, 21 ELR 35383 (July 8, 1991); Model Administrative Order on Consent for Removal Actions, § XV, 24 ELR 35579 (March 16, 1993). See discussion of 1995 model consent decrees, *infra*.

[12] *See e.g., Akzo Coatings Inc. v. Aigner Corp.*, 30 F.3d 761, 39 ERC 1013 (CA 7, 1994); *U.S. v. Colorado Eastern R.R. Co.*, 50 F.3d 1530, 40 ERC 2109 (CA 10, 1995); *Akzo Coatings of America Inc. v. American Renovating*, 842 F.Supp. 267, 271-73, 38 ERC 1924 (DC EMich 1992); *Transtech Industries Inc. v. A & Z Septic Clean*, 798 F.Supp. 1079, 1088 (DC NJ 1992) (allowing actions to go forward despite settlement with government); *Dravo Corp. v. Zuber*, 804 F.Supp. 1182, 1188, 35 ERC 1855 (DC Neb 1992), aff'd, 13 F.3d 1222, 37 ERC 2073 (CA 8, 1994); *Avnet Inc. v. Allied-Signal Inc.*, 825 F.Supp. 1132 (DC RI 1992); *Allied Corp. v. Frola*, 1993 U.S. Dist. 13343 (DC NJ, Sept. 21, 1993) (barring claims based on settlement with the government). *See also Rumpke of Indiana Inc. v. Cummins Engineering Co. Inc.*, 44 ERC 1065 (CA 7, 1997) (also allowing action to go forward despite settlement with government).

[13] 30 F.3d 761, 39 ERC 1013 (CA 7, 1994).

[14] *Id.* at 767.

[15] *Id.* at 766, n.8.

court then referred to the government's "sweeping power . . . to extinguish the contribution rights third parties would otherwise enjoy . . . ."[16]

Perhaps as a result of the *Akzo* dicta regarding the government's "sweeping power," combined with judicial deference in reviewing consent decrees,[17] the government's desire to settle cases quickly,[18] and an attempt to clarify settlements, the government appears to have changed its policy.

First, the government appears intent on explicitly defining "matters addressed" in consent decrees. EPA's most recent revised model consent decrees attempt to define "matters addressed" for the first time. In the "Revised Model *De Minimis* Contributor Consent Decree and Administrative Order on Consent," with a caveat "if the intended resolution of liability is narrower in scope," EPA states that "[t]he 'matters addressed' in this Consent Decree are [all response actions taken and to be taken by the United States and by private parties, and all response costs incurred and to be incurred by the United States and by private parties, at or in connection with the Site.]".[19] In its "Revised Model CERCLA RD/RA Consent Decree," EPA does not have any specific "matters addressed" proposed language. It states only that "['Matters addressed' should be defined explicitly in appropriate cases, *e.g.*, where the scope of contribution protection may otherwise be unclear from the circumstances of the case.]".[20]

In a second apparent policy change, the government has been more aggressive in offering settling parties widespread contribution protection, beyond the "matters" that the decree actually "addresses." In *Akzo*, the government submitted an *amicus* brief voicing concern about overly broad contribution protection:

> On the other hand, the contribution protection tool is not unlimited. As set forth above, § 113(f)(2) provides contribution protection only for the "matters addressed in the settlement." This limitation assures that settling parties will not be afforded contribution protection beyond the scope of the matters that they settle with the government, thus preventing over broad contribution protection that could be unfair to other liable parties and undermine the fairness of the CERCLA settlement scheme. If parties who perform cleanups voluntarily have their contribution claims cut off in an unintended and unfair manner, they and others will be discouraged from undertaking voluntary cleanups in the future.[21]

By contrast, in meetings with groups of potentially responsible parties, EPA lawyers now routinely offer to protect parties, particularly if they are considered *de minimis*, from all claims by *all* parties, even if the proposed settlors make payment to the government only.[22]

For instance, in our previous example, the generator agrees to pay to the government 10 percent of the cost of cleaning the soil cyanide contamination. To induce this settlement, the government may offer to define "matters addressed" to include *all* response costs incurred by the government or any potentially responsible party. This language would protect the generator from all transporter claims for its lead cleanup as well all claims for the vinyl chloride contamination in the ground water, even though (1) the decree did *not* address the lead or vinyl chloride contamination, and (2) the generator made no payment to the transporter for its lead cleanup.

In three recent cases, these attempts to bar contribution claims with a broad construction of "matters addressed" have backfired. Courts have refused to bar private party claims against parties that settle their claims with the government. In two of these cases, courts have rejected consent decrees on grounds that the definition of "matters addressed" was overly broad. These cases are discussed below.[23]

1. Waste Management of Pennsylvania v. York. *Waste Management of Pennsylvania v. York*,[24] involved a CERCLA administrative order by consent (AOC)[25] between the U.S. Environmental Protection Agency and the city of York, Pa., at the Old City of York Landfill Site. The city, joined by EPA as an intervenor, argued that the AOC, combined with CERCLA's contribution protection provision,[26] insulated the city from response costs claims by Waste Management. Waste Management countered that the AOC did not, and could not, "address" its costs.

The court agreed with Waste Management. First, it held that CERCLA's statutory language restricts the "matters" that an AOC could "address" to "costs incurred by the United States Government."[27] Nongov-

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[16] *Id.* at 768.

[17] Proposed settlements must be fair, reasonable and consistent with CERCLA. *U.S. v. Cannons Engineering, supra, n.4* at 84. Review of such settlements is committed to the discretion of the reviewing court which is to exercise this discretion in a limited and deferential manner. *Id.; U.S. v. Akzo Coatings of America, Inc., supra, n.4* at 1424; *U.S. v. Hooker Chemical & Plastics Corp.*, 776 F.2d 110, 118 (CA 2, 1992).

[18] As the "matters addressed" relates to the extent of the settling private parties' protection from contribution claims of other parties, any settling party has the incentive, once it has agreed to settlement, to have the "matters addressed" in its decree defined as broadly as possible. Similarly, as long as the government does not anticipate that it will incur any additional costs, as a way to encourage settlement at no cost to itself, the government has no reason, other than fairness to the nonsettling parties (which the government often refers to as "recalcitrant"), to object to a broad definition of matters addressed.

[19] 60 FR 62849, 62853, 62857 (Dec. 7, 1995) (second set of brackets in original).

[20] 60 FR 38817, 38835 (July 28, 1995) (brackets in original). In its most recent "Final Model CERCLA Past Costs Consent Decree and Administrative Agreement" EPA defines the "matters addressed" as "Past Response Costs" as costs paid by the United States. 60 FR 62446, 62453 (Dec. 6, 1995).

[21] Brief of the United States as *Amicus Curiae*, *Akzo Coatings Inc. v. Aigner Corp.*, No. 92-3820 (CA 7), filed March 30, 1993, 7-8.

[22] Conversations with various attorneys in Chicago attending PRP meetings with government attorneys. See also discussion in text reviewing language of EPA's most recent model decrees.

[23] These cases are *Waste Management of Pennsylvania v. York*, 910 F.Supp. 1035, 42 ERC 1170 (DC MPa 1995); *Kelley v. Wagner*, 930 F.Supp. 293 (DC EMich 1996) and *U.S. v. Nalco Chemical Corp.*, 1996 U.S. Dist. LEXIS 13089 (DC NIll, Sept. 4, 1996).

[24] 910 F.Supp. 1035, 42 ERC 1170 (DC MPa 1995).

[25] Section 122(h) of CERCLA, 42 U.S.C. 9622(h), authorizes EPA, in certain circumstances, to enter into administrative settlements for the United States' response costs.

[26] Section 122(h)(4), 42 U.S.C. 9622(h)(4), parallels the contribution language of Section 113(f), 42 U.S.C 9613(f). It states that "[a] person who has resolved its liability to the United States under this subsection shall not be liable for claims for contribution regarding matters addressed in this settlement."

[27] Section 122(h)(1), 42 U.S.C. 9622(h)(1). The court distin-

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ernment costs could not possibly be "matters addressed" in an administrative settlement. Second, the court noted that administrative settlements are not subject to judicial review for reasonableness and fairness. The court pointed out that judicial review "affords a PRP the opportunity to adjudicate the fairness of contribution protection in the context of a complete site remediation plan." [28] Without judicial approval, the court held that it would be unfair to authorize an administrative order to prevent a private party claim.

Finally, the court focused on the fundamental unfairness of allowing a settlement of the government's costs to interfere with a private party claim:

> Clearly, Congress did not intend agreements between the government and private parties to foreclose all other private party claims against the settling parties. Such a result would be fundamentally unfair to non-settling parties and would discourage such parties to engage in cleanup operations, contrary to one of CERCLA's primary goals.[29]

The court added that to foreclose all other private party claims against nonsettling parties "would implicate Fifth Amendment issues," in that "[t]he right to sue a party for contribution or to recover costs incurred may be viewed as a property right. Depriving a party of that right raises a question of whether there has been a taking of property without just compensation . . . ." [30] The court found the constitutional concern to be greatest in circumstances in which a private party has incurred substantial costs that the AOC is threatening to extinguish. For these reasons, it allowed Waste Management to go forward with its response cost claim.

2. Kelley v. Wagner. In *Kelley v. Wagner*,[31] the court rejected a consent decree which defined "matters addressed" to extinguish all third-party response cost claims. General Electric entered into a consent decree in which it agreed to pay Michigan its proposed percentage allocation (as determined by EPA) multiplied by the state's total response costs. The decree did not provide for payment to any other party, although significant future response costs were anticipated. Nevertheless, the parties defined "matters addressed" broadly to include claims of *any* party:

> Defendant (GE) shall not be liable for claims of contribution regarding matters addressed in this Consent Decree. "Matters addressed" means all response costs incurred or to be incurred by the State, *or any other party* at or in connection with the facility, including, but not limited to, all removal and remedial costs.[32]

The language proved fatal to the decree. The court found that "the whole gist of the consent decree is settlement of costs incurred or to be incurred by the State," and not those of nonsettling parties.[33] By contrast, "the 'matters addressed' provision does appear to give contribution to GE for much more than the State's costs." [34]

The court explained that the definition of "matters addressed" may govern the scope of contribution protection in a future action.[35] For this reason, before it approves a decree, the court ruled that it must determine that the "matters addressed" language complies with CERCLA and the Constitution:

> The implication is that I approve the Consent Decree now and Akzo later attempts to seek contribution from GE, the presence of the explicit definition of "matters addressed" implicitly approved by me, may be viewed as dispositive without further consideration of the ramifications upon due process and CERCLA policy. If I leave this for another day, I would be abdicating my responsibility to review consent decrees before approving them.[36]

The court rejected the decree as unfair, unreasonable and inconsistent with the purposes of CERCLA. It held that GE was not paying its fair share of total liability.[37] The court speculated that the state merely "threw in" the broad "matters addressed" provision as a "bargaining chip" with GE, hoping it would not resurface until much later, when others attempted to pursue GE for their costs.[38] The court found that settling parties receive a measure of finality in their settlements, even if private party claims go forward, because contribution claims regarding the government's costs are extinguished. The court added that "at the same time, the policy in favor of a roughly equitable apportionment of costs, according to fault is preserved by limiting contribution claims to those costs that are incurred by the State." [39]

Finally, the court ruled that to extend "matters addressed" beyond those costs actually addressed in decrees is inconsistent with CERCLA's purpose to encourage voluntary cleanups:

> To allow a State to offer protection for claims for contribution for costs voluntarily incurred by a private party could deter private parties from undertaking such cleanups for fear of being stuck with the full bill. Certainly this is not consistent with the objectives of CERCLA.[40]

3. U.S. v. Nalco Chemical Corp. In *U.S. v. Nalco Chemical Corp.*,[41] the court rejected five proposed consent decrees, including four *de minimis* decrees, on grounds that the decrees defined "matters addressed" too broadly. The landowner, Commonwealth Edison, had voluntarily spent more that $1.1 million to clean a portion of the site. In five of the decrees, the government defined "matters addressed" to include all claims by both the United States "or any potentially responsible

guished administrative settlements under Section 122(h) from other settlements, such as *de minimis* settlements under Section 122(g) and consent decrees to perform cleanups under Section 122(d). Unlike an administrative settlement under Section 122(h), the statutory language authorizing settlements under sections 122(d) and 122 (g) does not restrict either of these types of decrees to "costs incurred by the United States Government."

[28] 910 F.Supp. at 1040.

[29] *Id.* at 1042–43.

[30] *Id.* at 1043.

[31] 930 F.Supp. 293 (DC EMich 1996).

[32] 930 F.Supp. at 295 (emphasis added).

[33] *Id.* at 295, n.2.

[34] *Id.* at 299.

[35] *Id.* at 297–98, quoting *Akzo Coatings Inc. v. Aigner Corp.*, 30 F.3d 761, 766, n. 8.

[36] *Id.* at 298.

[37] Total projected site liability was anticipated to be $95 million. GE was estimated to be responsible for 0.68 percent of that figure (about $646,000), but was settling for only $35,000.

[38] 930 F.Supp. at 299.

[39] *Id.*

[40] 930 F.Supp. at 299.

[41] 1996 U.S. Dist. LEXIS 13089 (DC Nill, Sept. 4, 1996). The magistrate judge's Report and Recommendation was adopted in full by the district court on Sept. 23, 1996.

party at or in connection with the Site. . ." [42] The proposed decrees did not mention Commonwealth Edison's voluntary cleanup. Nor were any of the settling parties paying anything to Commonwealth Edison.

The court rejected the decrees as unfair, unreasonable, and inconsistent with CERCLA's purposes. The government's global allocation assigned Commonwealth Edison a 12.34 percent share of total site costs. By demanding payment of 12.34 percent of its costs *and* at the same time extinguishing Commonwealth Edison's voluntary cleanup claim against the settling parties, the government was forcing Commonwealth Edison to absorb more than its 12.34 percent allocation.

Additionally, to bar contribution claims with no compensation, particularly "where, as here, the claims resulted from a voluntary cleanup that was lauded by the EPA," was, according to the court, "not consistent with the goals of CERCLA." [43] Allowing the settlors protection in these circumstances "could deter individuals from undertaking such voluntary cleanups since those individuals would fear getting stuck with the full bill . . . ." [44] Although the court acknowledged government's authority to wipe out contribution claims, it ruled that it is inconsistent with CERCLA's purposes for the government to " 'hold out as a carrot to entice settlement of its claims only, protection from contribution for response cost' . . . that Commonwealth Edison voluntarily undertook." [45]

[42] *Id.* at * 17–18. The four *de minimis* decrees provided protection against all site costs, both past and future. The sixth consent decree (which was also rejected) was a non-*de minimis* decree which provided protection for past costs only.

[43] *Id.* at * 24

Conclusion.

The trilogy of recent cases focusing on "matters addressed" make it clear that courts are carefully scrutinizing the extent of contribution protection which consent decrees claim to address. Though it is enticing for a settling party to seek broad "matters addressed" language beyond the matters that are actually settled, the settlor runs a significant risk that a judge will reject its consent decree. In accordance with *Akzo*, in a settlement with the government, parties may receive contribution protection from minor private party costs (such as identifying potentially responsible parties), incurred directly in connection with the government's attempts to retrieve its costs. However, the risk that a court will reject the decree is highest if an objecting party has incurred its own cleanup costs, which the settling party has not redressed. To protect the integrity of a proposed consent decree, settling parties should assure themselves that the settlement covers all "matters" that the consent decree claims to "address."

[44] *Id.* at * 25, citing *Kelley v. Wagner*, 930 F.Supp. 293, 299.

[45] *Id.* at * 27, citing *Kelley v. Wagner*, 930 F.Supp. 293, 295.

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